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No. 78-1475

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN W. PENCE, PETITIONER

v.

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The orders of the district court (Pet. App. 1-4) and of the court of appeals (Pet. App. 7) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1978 (Pet. App. 7). The petition for a writ of certiorari was filed on March 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's failure to exhaust his administrative remedies precludes his current challenge to the terms of his military service.

STATEMENT

On July 1, 1973, petitioner volunteered to participate in the Armed Forces Health Professions Scholarship Program. He was a medical student, and the program paid his tuition and expenses for two years of medical school in return for two years of active duty in the Air Force. After completion of two years of residency in pediatrics, petitioner tendered his resignation from the Air Force. He contended that there was an urgent need for his services in a rural community and that the Air Force had failed to honor the details of his contract.[1] The resignation was not accepted; petitioner was ordered to active duty in July 1978, after he completed his residency. He failed to report as ordered. Some time after his failure to report, petitioner filed this suit seeking release from his contract.

The district court declined to exercise jurisdiction, holding that petitioner had failed to exhaust his administrative remedies by applying to the Air Force Board for Correction of Military Records as provided by 10 U.S.C. 1552 (Pet. App. 1-4). The court of appeals affirmed, agreeing with the district court that petitioner had ignored his administrative remedies (Pet. App. 7). Petitioner now is serving as a pediatrician for military dependents at Minot Air Force Base, North Dakota.[2] Court-martial proceedings against him for his failure to report for active duty in July 1978 are pending.

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[1]He alleged that he was guaranteed assignment to one of his first two choices of geographical areas. He also alleged he was promised that he would enter active duty with the rank of Major and be eligible for promotion four years later.

[2]Petitioner surrendered to Air Force authorities on January 11, 1979, and then applied for an order from this Court compelling his release from active duty pending the disposition of his petition for a writ of certiorari. The application (No. A-844) was denied by Mr. Justice Stewart on April 6, 1979, and by the Court on April 23, 1979.

ARGUMENT

A serviceman cannot challenge the terms of his military service in the federal courts until he has exhausted the available administrative remedies. *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975); *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Gusik* v. *Schilder*, 340 U.S. 128 (1950).[3] As this Court pointed out in *Schlesinger* v. *Councilman*, *supra*, the exhaustion doctrine is based on the ability of agencies to develop the facts, apply the law and correct their own errors. It ensures that any authorized judicial review will be well-informed and based on a considered administrative decision. It avoids duplicative proceedings and often obviates the need for judicial review (420 U.S. at 756-757).

Petitioner ignored his administrative remedies for some time. He resorted, instead, to self-help, simply disregarding the order to report for duty. Finally, six days before oral argument in the court of appeals, he mailed an appeal to the Air Force Board for Correction of Military Records. But that tardy step simply commenced the administrative process. The decision of the Board has yet to be made; the Board should have its opportunity.

Petitioner contends that there is no need for exhaustion of his administrative remedies because the

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[3]See also *Diliberti* v. *Brown*, 583 F. 2d 950 (7th Cir. 1978); *Seepe* v. *Department of the Navy*, 518 F. 2d 760 (6th Cir. 1975); *Horn* v. *Schlesinger*, 514 F. 2d 549 (8th Cir. 1975); *Champagne* v. *Schlesinger*, 506 F. 2d 979 (7th Cir. 1974); *Hodges* v. *Callaway*, 499 F. 2d 417 (5th Cir. 1974); *Sherengos* v. *Seamans*, 449 F. 2d 333 (4th Cir. 1971); *Nelson* v. *Miller*, 373 F. 2d 474 (3d Cir.), cert. denied, 387 U.S. 924 (1967); *Sohm* v. *Fowler*, 365 F. 2d 915 (D.C. Cir. 1966). Petitioner cites *Parisi* v. *Davidson*, 405 U.S. 34 (1972); the serviceman there had exhausted his administrative remedies (*id.* at 37).

question at issue is purely a matter of contract law. That is not so. It is a mixed question of fact and of law. If the Air Force's development of the facts and its application of the law does not eliminate the need for a judicial decision, its efforts will at least facilitate that review. *Seepe* v. *Department of the Navy*, 518 F. 2d 760 (6th Cir. 1975).[4]

The fact that petitioner is on active duty and that court-martial proceedings are pending does not excuse him from exhausting his administrative remedies. *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 758. The military bodies designated to hear claims like petitioner's—and to vindicate those claims if they are substantiated—have not yet been able to consider them. Petitioner may appeal the denial of his resignation to the Air Force Board for Correction of Military Records, a process he has initiated. The decision of the Board is reviewable by a court. 10 U.S.C. 1552; 32 C.F.R. Part 865, Subpart A; *Seepe* v. *Department of the Navy*, *supra*. Petitioner may defend court-martial proceedings on the basis of the unlawfulness of the order to report for duty. 10 U.S.C. 886. Petitioner may also seek to resign for the good of the service in lieu of court-martial and pursue that remedy through administrative processes. Air Force Reg. 36-12.

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[4]Petitioner suggets (Pet. 14) that because military service is now voluntary, his contract with the Air Force is suspect. That claim is without merit. Petitioner signed a contract with the Air Force agreeing to perform two years of active duty in return for receiving tuition and expenses for two years of medical school. He received the benefit of his bargain. A person is bound by the contracts he makes; his performance of their terms is a legal duty. 1 *Williston on Contracts* §1 (Jaeger ed. 1957); 1 A. Corbin, *Contracts* §3 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979